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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR ADOLFO TRUJILLO,

Defendant and Appellant.

F057007

(Super. Ct. No. BF124207A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Jerold L. Turner, Judge.

James L. Lozenski, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Hill, J.

INTRODUCTION

Appellant Edgar Trujillo pled no contest to gross vehicular manslaughter while intoxicated and to driving without a license. Trujillo contends the trial court erred at sentencing when it considered a prior arrest, for which he had not yet been tried or convicted, and used the prior arrest as a basis for imposing an aggravated term. We will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On July 13, 2008, Trujillo was stopped in Fresno and cited for driving without a license and driving under the influence of alcohol. Six days later, on July 19, Trujillo ran a red light and struck a car driven by Maria Pena. The collision killed Pena. Trujillo was admitted to the hospital for treatment of injuries and a blood test disclosed his blood-alcohol level was .27 percent. Trujillo was placed under arrest. Trujillo admitted driving under the influence of alcohol, admitted he had consumed too much alcohol to drive a vehicle safely, and acknowledged the light was “probably red.”

An investigation determined Trujillo had been traveling 60 to 90 miles per hour at the time of the collision. Pena had been traveling 30 to 50 miles per hour. There were skid marks left by Trujillo’s vehicle, but none from Pena’s vehicle. The investigating officer concluded that Trujillo knew he should have stopped for the red light but was traveling too fast to stop the car before it entered the intersection and struck Pena.

Trujillo was charged with three counts: (1) gross vehicular manslaughter while intoxicated; (2) driving under the influence of alcohol causing bodily injury; and (3) driving without a license. Pursuant to a negotiated plea, Trujillo pled no contest to counts one and three, in exchange for dismissal of count two.

The plea form signed by Trujillo stated in part:

“I understand that the sentencing judge may consider my prior criminal history and the prior factual background of the instant case, including any unfiled, dismissed or stricken charges or allegations or cases when granting probation, ordering restitution or imposing sentence.”

Trujillo initialed this paragraph of the plea agreement form, indicating that he had read, understood, and agreed to this provision.

At sentencing, the prosecutor referenced Trujillo's arrest in Fresno six days prior to the collision that killed Pena. Defense counsel objected to the trial court considering the Fresno arrest as a sentencing factor. The trial court noted that "the specific facts of that incident ... in Fresno" were not significant, but the fact that Trujillo was stopped and engaged in "impermissible" conduct was and the trial court was considering "the fact of the prior arrest" in sentencing. The trial court commented that Trujillo had no driver's license when arrested in Fresno and had no license at the time of the collision that killed Pena. The trial court also noted that Trujillo had been cited for driving under the influence of alcohol in both the Fresno incident and the incident in which Pena was killed.

In addition to the Fresno arrest, the trial court cited three other aggravating factors in imposing sentence. The three additional aggravating factors were (1) the blood-alcohol content of .27 percent; (2) the high rate of speed at the time of the collision; and (3) running the red light. The trial court sentenced Trujillo to the upper term of 10 years in state prison for the count one offense and a concurrent 30 days for the count three offense.

DISCUSSION

Trujillo's sole contention on appeal is that the trial court erred in using any information regarding his Fresno arrest as an aggravating factor at sentencing and that absent this error the upper term would not have been imposed. He is mistaken.

Trujillo's assertion that his sentence would have been different if the trial court had not considered the circumstances of the Fresno incident simply is not supported by the record. The trial court articulated at least four factors in aggravation, only one of which pertained to the Fresno arrest six days prior to the collision that killed Pena. A

single aggravating factor is sufficient to justify imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728 (*Osband*).)

The probation report noted Trujillo’s “limited record of criminal conduct” was a mitigating factor in recommending a sentence. The probation report recommended a sentence of 10 years in state prison for the count one offense, in accordance with the terms of the plea agreement. The plea agreement provided that Trujillo could be sentenced to a maximum of 10 years in prison. At sentencing, the trial court noted that it was not treating the plea agreement as stipulating to a 10-year sentence.

Throughout the sentencing, the trial court emphasized Trujillo’s recklessness—driving without ever having obtained a driver’s license, failing to yield the right of way to Pena, running the red light, the excessive speed Trujillo was traveling, and a blood-alcohol level three and one-half times the legal limit. After listing all these aggravating factors, the trial court stated that as a result of Trujillo’s “gross negligence *in this particular case* and significant lack of judgment” a life was lost. (Italics added.) Based upon these aggravating factors, the trial court stated the maximum term set forth in the plea agreement was “warranted.”

Consequently, even if the trial court considered the Fresno arrest as an aggravating factor in some fashion, and erred in doing so, any error was harmless. It is not reasonably probable the trial court would have imposed a lesser sentence, absent the earlier Fresno arrest, in light of the other aggravating factors cited by the trial court—the trial court’s emphasis on Trujillo’s conduct in the instant case, the probation department’s recommendation, and the terms of the negotiated plea. (*Osband, supra*, 13 Cal.4th at pp. 728-729.)

In light of our conclusion, we need not address the merits of Trujillo’s contention that the trial court erred in considering the Fresno arrest.

DISPOSITION

The judgment is affirmed.